Supreme Court, U.S.
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No. 97-172

In The

Supreme Court of the United States

October Term, 1996

GEORGE PHILLIPS and PHILIP VITALE,

Petitioners,

vs.

BOROUGH OF KEYPORT, a political subdivision of the State of New Jersey, VICTOR RHODES, in his official capacity as Construction Official and Zoning Officer of the Borough of Keyport, and individually, BOARD OF ADJUSTMENT of the Borough of Keyport,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Third Circuit Court of Appeals properly remand to the district court this First Amendment challenge to an ordinance regulating adult entertainment uses in order to enable the defending municipality to demonstrate the secondary effects the municipality alleges the ordinance was designed to ameliorate and that the ordinance was thus based upon a content neutral governmental interest?

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STATEMENT OF THE CASE

A. Borough of Keyport Ordinance No. 31-92

This matter involves a challenge to an adult entertainment ordinance adopted by the New Jersey Borough of Keyport in 1992. The Ordinance No. 31-92 prohibits "Adult Entertainment Uses", *i.e.*, adult bookstores, adult motion picture theaters, adult mini-motion picture theaters and cabarets, in all zones, except where expressly permitted (A.7)[1]. Further, Ordinance No. 31-92 provides that, where such Adult Entertainment Uses are expressly permitted, no Adult Entertainment Use shall be located:

> (a) within 500[2] feet of any residence, residential use and/or residential zone; or
>
> (b) within 500 feet of any of the following users:
>
> 1. Churches, monasteries, chapels, synagogues, convents, rectories, religious artifice or religious apparel stores, or any religious use; or
>
> 2. Schools, up to and including the

---

1. The notation A.7 refers to the Appendix of petitioners at page 7. Respondents have not submitted a separate appendix and refer to that of petitioners throughout this brief.

2. During the district court proceedings below, this provision was amended to reduce this distance to 300 feet. Although the Third Circuit court ordered the district court to consider various aspects of both the 300-foot and the 500-foot version of the ordinance, these distances are not at issue in the within Petition.

> twelfth (12th) grade, and their adjunct play areas; or
>
> 3. Public playgrounds, public swimming pools, public parks and public libraries.

(A.9-10).

Respondent Keyport summarized its legislative findings and reasons for the adoption of the Ordinance in the introductory language of the Ordinance:

> In the development and execution of this section it is recognized that there are certain uses which, because of their very nature, are recognized as having serious objectionable operational characteristics.

(A.8).

> These uses create and promote a deleterious effect on the Borough's neighborhood characteristics, administration of schools, and the commercial and economic viability of the community. These uses impact on the Borough's neighborhood areas and conflict with the intent of the Borough Master Plan, particularly those segments listed on pages 16 and 19 therein which provide that a primary zoning objective is to preserve and protest [sic] existing residential areas and to enhance the desirability thereof. Adult Entertainment Uses are such uses.

(A.8).

The Borough of Keyport is a small residential community with its commercial areas zoned highly integrated with its residential properties. The commercial properties are in close proximity to its educational, religious, residential and youth recreation facilities with a high volume of pedestrian activity, including children, throughout the area.

(A.8).

The industrial zone as it exists is not comprised of major industrial operations, but of mixed use nature including retail/ commercial uses, it is so situated as to provide easy access to and highway exposure. The industrial zone is suitably distant and buffered from the residential and mixed commercial zones as to minimize a negative or deleterious effect.

(A.8-9).

In order to prevent the deterioration of the community, to preserve the neighborhoods of the Borough of Keyport, to ensure the economic prosperity of the community and to provide for the protection and well being of the quality of life in the Borough of Keyport, certain regulations are necessary to prevent these adverse effects.

(A.9).

B. The District Court

The Ordinance was challenged by petitioners, who sought to operate the X-TASY Bookstore, an adult book and video store in the Borough of Keyport (A.2). Specifically, petitioners advanced four arguments before the district court: (1) Ordinance No. 31-92 violates their right of free expression because it is not narrowly tailored to achieve a substantial, content-neutral governmental interest and because it does not leave adequate alternative channels of communication; (2) the Borough violated their right to substantive due process by revoking their original permits, by delaying action on their two subsequent applications, and by denying their third application based on Ordinance No. 31-92; (3) they are "prevailing parties" entitled to attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and (4) the Borough is equitably estopped from revoking their original permits (A.12).

Resolving motions to dismiss and motions for summary judgments advanced by both parties, the district court, in three separate orders, found that: (1) the Ordinance was content-neutral and narrowly-tailored; (2) the complaint failed to establish a substantive due process claim; (3) that petitioners Phillips and Vitale were not "prevailing parties"; and (4) that there was no equitable estoppel (A.12-14).

C. The United States Court of Appeals for the Third Circuit

Phillips and Vitale appealed the entire matter to the United States Court of Appeals for the Third Circuit, advancing the same four arguments that were before the district court (A.12). After briefing and oral argument, the circuit court ordered the parties to engage in a second argument *en banc* (A.1). Following the *en banc* argument, the court determined that, based upon deficiencies in the record before it, the district court was in no

position to render a final determination on either the content-neutral/alternative channels for communication claim or the substantive due process claim and remanded the matter to the district court for further proceedings on both claims (A.17-18, 27, 36). Further, the court determined that, only after the first two claims were properly determined could the district court definitively determine whether Phillips and Vitale were "prevailing parties" entitled to any attorneys' fees (A.37). The circuit court upheld the determination that there was no equitable estoppel (A.40, 41).

D. The Underlying Dispute

Petitioners are before this Court seeking review of the circuit court's treatment of the first argument listed above in which they claim that the ordinance is not constitutional because it is not narrowly tailored to achieve a substantial, content-neutral governmental interest (PB.1)[3]. Specifically, petitioners take issue with the following findings of the court below:

> . . . [W]e reject [appellants'] argument that they are entitled to a mandate requiring the entry of judgment in their favor on this claim. Phillips and Vitale read *Renton* and our decision in *Mitchell* as endorsing a *per se* rule that any governmental regulation of speech is invalid if the adopting entity did not have before it, at the time of adoption, evidence of the action taken. Thus, in appellants' view, a governmental entity may successfully defend a First Amendment challenge of the kind here mounted only if it can show that it was exposed, before taking action, to

3. The notation PB.1 refers to Petitioners' Brief at page 1. Similar notations are used throughout this brief.

> evidence from which one could reasonably conclude that the undesirable secondary effects would occur in the absence of legislative action and that the particular action taken was narrowly tailored to ameliorate those secondary effects. We find no such rule in *Renton*, *Mitchell*, or any other governing precedent.

(A.28).

> There is a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment is challenged and a requirement that such a factual basis have been submitted to the legislative body prior to the enactment of the legislative measure. We have always required the former; we have never required the latter. Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised. In reliance on this approach, most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed legislative measures. We perceive no justification in policy or doctrine

> for abandoning our traditional approach. Moreover, we believe that insistence on the creation of a legislative record is an unwarranted intrusion into the internal affairs of the legislative branch of governments.

(A.28-29).

> If a legislative body can produce in court whatever justification is required of it under the applicable constitutional doctrine, we perceive little to be gained by incurring the expense, effort, and delay involved in requiring it to reenact the legislative measure after parading its evidence through its legislative chamber . . .

(A.29).

In response to this excerpt of the decision below, it is petitioners' contention that, once the court below determined that there was not enough pre-enactment evidence regarding secondary effects in the record, the court should have found for petitioners instead of remanding the matter back to the district court. Respondents submit that the court's decision was the only practical and logical way of dealing with its findings and that the decision is in accord with other third circuit decisions, those of other circuit courts and those of this Court.

REASONS FOR DENYING THE WRIT

Jurisdiction on writ of certiorari lies only where compelling reasons exist. Rule 10. Such reasons include where a United States Court of Appeals has entered a decision in conflict with a decision of another Court of Appeals or has decided an

important federal question in a way that conflicts with relevant decisions of this Court. Petitioners cite both of these jurisdictional grounds as reasons for granting the petition. As set forth below, contrary to petitioners' arguments, neither of these grounds exist, and this petition should be denied.

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

Petitioners argue that the United States Court of Appeals for the Third Circuit has rendered a decision that is in conflict with the decisions of at least eight other United States Courts of Appeals on the same important matter (PB.14). The eight cases cited by petitioners are the same eight cases cited by Judge Rosenn in his dissenting opinion (A.57, n.2). However, the facts of those cases, the treatment of them by the 11 judge majority in the opinion below and more recent cases from these and other circuits demonstrate that the Opinion below is consistent with the decisions of all other Courts of Appeals.

Citing to Judge Rosenn's dissent and the eight Courts of Appeals cases cited in a footnote therein, petitioners claims that "... if the same issue were squarely presented to the First, Fourth, Fifth, Sixth, Seventh Eighth, Ninth and Eleventh Circuits, all eight circuits would agree with the dissent." (PB.22, 23). In other words, petitioners contend that the opinions cited by them and Judge Rosenn demonstrate that those Courts of Appeals would have held for the petitioners finding the ordinance in question unconstitutional instead of remanding the matter to the district court for further proceedings. Such a contention is simply not true.

Petitioners and the dissenting opinion cite the following cases: *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995), *cert. denied*, 115 S. Ct. 2247 (1995); *11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415, 1421-1423 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990); *SDJ, Inc. v. Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *Christy v. Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988); *Berg v. Health & Hospital Corp.*, 865 F.2d 797, 803-04 (7th Cir. 1989); *Postscript Entertainment v. Bridgeton*, 905 F.2d 223, 227 (8th Cir. 1990); *Tollis Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987); *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157, 1163 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992). However, as the majority of the court below points out, six of these cases, *National Amusements*; *11126 Baltimore Blvd.*; *SDJ, Inc.*; *Berg*; *Postscript Enter.* and *International Eateries*, upheld the ordinance at issue and therefore simply "cannot stand for the principle that the lack of a legislative record is a fatal constitutional defect." (A.29-30, n.6). Consequently, just a cursory look at those six cases demonstrate that, contrary to petitioners' argument, they do not demonstrate that the opinion below is at odds with those of the First, Fourth, Fifth, Seventh, Eighth and Eleventh circuit courts.

A closer look at the remaining *Christy* and *Tollis* decisions removes the Sixth and Ninth circuit courts, respectively, from petitioners' list as well. In *Christy*, the plaintiff sought a preliminary injunction in the district court to enjoin the enforcement of the City of Ann Arbor's adult business zoning regulations. *Christy v. Ann Arbor*, *supra*, 824 F.2d at 489. Plaintiff alleged that the regulations unconstitutionally restricted the operation of his adult bookstore. *Id.* The district court denied the motion and plaintiff appealed. *Id.*

– Like the instant case, the Court of Appeals considered whether the Ann Arbor ordinance was designed to serve a substantial governmental interest. In doing so, the court determined the following:

> In the case at hand, the district court's opinion notes only that the city "has asserted that its purpose in passing this ordinance is to prevent the concentration of adult businesses and resultant urban blight." 625 F. Supp. at 967. Upon careful review of the record in this case, we find no such "assertion", nor do we find evidence of a legitimate government objective for the passage of this zoning ordinance. In the absence of any such evidence in the record, we conclude that the district court abused its discretion in finding that "the evidence that Ann Arbor offered [is] sufficient justification for this ordinance."

Id.

> In light of the errors which led to the district court's holding that plaintiff was unlikely to succeed on the merits, we VACATE the district court's order denying the preliminary injunction and REMAND this case for further proceedings consistent with this opinion.

Id. at 493 (emphasis in original).

This is exactly what has occurred in the instant case. Here, the Court of Appeals for the Third Circuit found:

> The district court concluded, on the basis of the legislative findings contained in Ordinance No. 31-92, that the Ordinance is an effort to suppress the secondary effects of sexually explicit expression and not sexually explicit expression itself. Apparently, it further tacitly concluded, without explanation, that Ordinance No. 31-92 was narrowly tailored to achieve that objective. We conclude that the district court was simply not in a position to make these findings.

(A.16).

* * *

> The judgment of the district court will be reversed and the case will be remanded for further proceedings consistent with this opinion.

(A.41). Thus, the court in the instant case did exactly what the *Christy* court did.

Similarly, in *Tollis*, the plaintiff sought a preliminary injunction in the district court to enjoin San Bernardino County from enforcing its "adult oriented business" ordinance. *Tollis v. San Bernardino County*, 827 F.2d 1329, 1330 (9th Cir. 1987). Plaintiff alleged that the ordinance unconstitutionally interfered with his right to operate an establishment that offered both live entertainment and adult movies. *Id.* at 1331.

It is important to note the precise issue that was in dispute in *Tollis*. In opposing the injunction, the County stated that it

interpreted the ordinance in such a way that a single showing of an "adult motion picture" would make a theater an "adult oriented business" for purposes of the ordinance. In response, the plaintiff contended that the ordinance as so construed was unconstitutionally overbroad on its face. *Id.* at 1331. The district court granted the preliminary injunction and the County appealed.

In finding against the County and affirming the district court's decision, the Court of Appeals for the Ninth Circuit stated:

> Here, the County has presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. The County has thus failed to show that the ordinance, as interpreted by the County to include any theater that shows an adult movie a single time is sufficiently " 'narrowly tailored' to affect only the category of theaters shown to produce the unwanted secondary effects." *Renton*, 106 S. Ct. at 931. ***Nor do we see how the County could make such a showing, since it is difficult to imagine that only a single showing ever, or only one in a year, would have any meaningful secondary effects.*** We therefore affirm the district court's injunction against enforcing the ordinance as the County at present interprets it.

Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1333 (9th Cir. 1987) (emphasis added).

Thus, contrary to petitioner's arguments that the *Tollis*

decision supports its position in the instant case, the decision involves a unique factual situation that is not applicable to the facts herein. Further, the above-quoted language actually supports respondents' position in that it demonstrates that the court seriously considered whether or not the County ***could make a showing*** given the opportunity such as the opportunity provided by the third circuit here. It was only after determining that such a showing could not be made that the court affirmed the district court's injunction.

A closer look at the opinions of all of the Courts of Appeals demonstrates that, in fact, ***there is not one circuit*** with which the court's opinion below is inapposite.

A. The First Circuit

In *National Amusements v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995), in affirming the district court's summary judgment against an adult movie theater owner, the Court of Appeals acknowledged that the stated content-neutral interest of the town must be supported by evidence. *Id.* at 741. This is consistent with the court's opinion in the instant case. However, unlike the instant case, the *National Amusements* court determined that there was sufficient evidence before it, *Id.* at 741, and further proceedings were not necessary.

B. The Second Circuit

A thorough search of the case law from this circuit failed to identify any post-*Renton* cases on point. Consequently, there are no second circuit opinions that are in conflict with the decision of the third circuit in the instant case.

C. The Third Circuit

In addition to the case at hand, the third circuit has recently decided two other cases on point: *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993), and *Contractors Association v. City of Philadelphia*, 6 F.3d 990 (3rd Cir. 1993). In *Mitchell*, the court considered and found proper the district court's reliance on evidence presented after the ordinance in question was enacted. *Id.* at 135. However, the court also found that the ordinance in question was justified on the pre-enactment evidence of secondary effects alone. *Id.* Consequently, the court expressly reserved the issue of whether ". . . a statute passed without any pre-enactment evidence of need or purpose" can be valid. *Id.* at 136. Thus, the opinion in the instant case is not at odds with that of the *Mitchell* court.

In *Contractor's Association*, the court considered the constitutionality of an ordinance favoring minorities, women and disabled persons in the award of Philadelphia construction contracts. *Id.* at 1000. Unlike the instant case which involves an intermediate level of constitutional scrutiny, the ordinance drew lines on the basis of race and was therefore subject to strict scrutiny. *Id.* Thus, the city had the burden of setting forth a strong evidentiary basis for concluding that there had been preexisting discrimination in the city's award of contracts and that the ordinance was necessary to prevent the continuing effects of such discrimination. *Id.* at 1001, 1002.

The plaintiffs argued that the ordinance should be held unconstitutional if the city council did not have the required evidentiary basis before it at the time of enactment. The court rejected that argument, holding that the city council did not have the required evidentiary record before it at the time it acted, but that it could justify the ordinance on the basis of evidence acquired thereafter. *Id.* at 1003, 1004. This decision is clearly

consistent with that of the instant case, as was noted by the court in the case at hand as follows:

> If we do not insist on a legislative record when we are required to subject a legislative measure to the highest scrutiny, we would be hard-pressed to rationalize insistence on a legislative record when we are, as here, applying a lesser, more deferential standard of constitutionality.

(A.31).

D. The Fourth Circuit

In *11126 Baltimore Blvd. v. Prince George's County, Md.*, 886 F.2d 1415 (4th Cir. 1989), the court reversed a district court's holding that adult bookstore regulations were unconstitutional. The court determined that there was enough evidence before the County at the time of enactment to sustain the regulation's stated purpose of ameliorating secondary effects. In addition, in noting the district court's discounting of post-enactment evidence, the court stated the following:

> A cursory review of the case law reveals that courts have routinely admitted evidence at trial to supplement a legislative record or explain the stated interests behind challenged regulations. It would appear from reviewing the *Renton* case, for example, that testimony of this nature was admitted at trial and considered on appeal.

See also 15192 Thirteen Mile Road, Inc., v. City of Warren, 626 F. Supp. 803, 818 (E.D. Mich. 1985) (trial testimony "clearly

demonstrates that adult uses are a source of urban blight"). *Id.* at 1425.

The decision in the instant case is clearly consistent with that of the *11126 Baltimore Blvd.* court.

E. The Fifth Circuit

The Fifth Circuit Court of Appeals has decided several cases that are consistent with that of the instant case including *SDJ, Inc. v. City of Houston*, 837 F.2d.1268 (5th Cir. 1988), and *Lakeland Lounge v. City of Jackson, Miss.*, 973 F.2d 1268 (5th Cir. 1992). Like the instant case, both the *SDJ* and *Lakeland* courts acknowledged that the cities' stated attempts at ameliorating secondary affects associated with adult entertainment businesses must be supported by evidence. Further, both courts determined that such evidence existed in the record before the legislative bodies at the time of enactment, and further proceedings were not necessary.

F. The Sixth Circuit

As set forth above, the Sixth Circuit Court of Appeals decided the *Christy v. City of Ann Arbor* case, 824 F.2d 489 (6th Cir. 1987), in which the court determined that: (1) there was not enough evidence in the record for the district court to have determined that the ordinance in question was designed to ameliorate secondary effects; and (2) remanded the matter back to the district court for further proceedings. The decision in the instant case is entirely consistent with that of the Sixth Circuit Court of Appeals.

G. The Seventh Circuit

In *Berg v. Health and Hospital Corporation of Marion County, Ind.*, 865 F.2d 797 (7th Cir. 1989), the Court of Appeals

for the Seventh Circuit upheld an ordinance, finding that the legislative body relied upon evidence that was sufficient to demonstrate the potential for secondary effects. Consequently, further proceedings were not necessary. This decision, like those of the first through sixth circuits, is entirely consistent with that of the instant case.

H. The Eighth Circuit

In *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223 (8th Cir. 1990), the Court of Appeals for the Eighth Circuit held that ***the introductory clauses to the city's ordinance*** restricting the viewing of movies within closed booths was sufficient to identify the legislative body's concerns with secondary effects. Specifically, the court stated:

> The Bridgeton ordinance introductory clauses, however, identify the council's concerns, which were the health and safety of the public, as well as describing its program for promoting those concerns, which consisted of the elimination of enclosed viewing booths. The findings of the Bridgeton County Council are consistent with the findings and stipulations made by other city councils or legislative bodies in Minneapolis, Minnesota, *Id.* at 615; Marion County, Indiana, *Berg v. Health and Hospital Corp.*, 865 F.2d 797, 803-04 (7th Cir. 1989); Newport News, Virginia, *Wall Distrib.*, 782 F.2d at 1169; and Phoenix, Arizona, *Ellwest Stereo Theatres v. Wenner*, 681 F.2d 1243, 1245 (9th Cir. 1982). Bridgeton attached to its motion for summary judgment certain pages out of the Final report of the Attorney

> general's Commission on pornography and, while there is no showing that the Bridgeton City Council was aware of this report or relied upon it, we at least observe the findings of the city council are consistent with that report, which has been referred to in at least one United States Supreme Court Opinion. *See Osborne v. Ohio*, __ U.S. __, 110 S. Ct. 1691, 1697, n.7, 109 L. Ed. 2d 98 (1990) (noting the report's discussion of the ills of child pornography). ***We believe that the "Whereas" clauses preceding the ordinance provide adequate factual undergirding for its enactment.***

Id. at 227 (emphasis added).

Consequently, petitioners' reliance on this case for the premise that, had the instant case been before the ninth circuit that court would have found Keyport's ordinance unconstitutional is totally unfounded. Instead, the above-quoted findings demonstrate the likelihood that the ninth circuit would have found that the "Whereas" clauses in Keyport's ordinance "provide adequate factual undergirding for its enactment" without even remanding the matter for further proceedings on this point.

I. The Ninth Circuit

In addition to *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987), which is discussed at length above and is entirely consistent with the decision at hand, the Ninth Circuit Court of Appeals decided *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986). There, the court was faced with an ordinance regulating barroom nude dancing. *Id.* The district court

had concluded that the King County Council had considered no evidence regarding the need for the ordinance before its adoption. *Id.* at 1111. However, the district court concluded that King County had adequately justified the ordinance by introducing affidavits from two police officers at the trial. *Id.* BSA argued that the *post facto* justification was impermissible and that a "claim of governmental interest must be supported by empirical, factual evidence actually considered at the time an ordinance is passed." *Id.* This is the same argument raised by petitioners in the instant case.

The Ninth Circuit Court found that BSA's argument was without merit for reasons including the following:

> First, it is sufficient that the County was able to present some evidence at the time of trial. In *Schad*, 452 U.S. at 72, 101 S. Ct. at 2184, the Supreme Court implied that the city could have justified its "substantial restriction of protected activity" by presenting evidence at trial. ***BSA provides not authority requiring that a legislative body need function like a court of law every time it considers legislation that may implicate the First Amendment.***

Id. at 1112 (emphasis added).

Similarly, in the case before this Court, petitioners have provided no such authority. In addition, the *Tollis* and *BSA* decisions demonstrate that the decision of the court below is wholly consistent with those of the Ninth Circuit Court of Appeals.

J. The Tenth Circuit

A thorough search of the case law has failed to identify any post-*Renton* cases on point. Consequently, there are no tenth circuit opinions that are in conflict with the decision of the third circuit in the instant case.

K. The Eleventh Circuit

In *International Eateries of America v. Broward County*, 941 F.2d 1157 (11th Cir. 1991), the eleventh circuit upheld the constitutionality of an adult entertainment ordinance finding that, among other things, the legislative body relied on evidence that was sufficient to demonstrate its concern with secondary effects. *Id.* at 1164. This decision is entirely consistent with that of the third circuit in the instant case.

L. The Twelfth and Thirteenth Circuits

A thorough search of the case law has failed to identify any post-*Renton* cases on point. Consequently, there are no twelfth or thirteenth circuit cases that are in conflict with the decision of the third circuit in the instant case.

Based on a review of all of the relevant decisions cited above, it is apparent that, contrary to petitioners' assertions, the decision of the Court of Appeals for the Third Circuit in the instant case is entirely consistent with those of each and every circuit court. Consequently, petitioners' assertion that the "U.S. Court of Appeals for the Third Circuit has rendered a decision in conflict with at least eight other United States Courts of Appeal on the same important matter" (PB.14) is not correct and cannot serve as a basis for granting the petition.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT.

Petitioners argue that the United States Court of Appeals for the Third Circuit has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court (PB.14). A review of the specific Supreme Court cases cited by petitioners makes it apparent that there is no basis for this argument.

Petitioners contend that the decision below contradicts the decisions of this Court in *Renton v. Playtime Theaters*, 475 U.S. 41 (1985); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Turner Broadcasting System v. FCC*, 520 U.S. __, __ L. Ed. 2d 369 (1997). Specifically, petitioners cite the following passage of *Renton* in support of their contention:

> [t]he First Amendment does not require a city, before enacting [an adult use] ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*

Renton v. Playtime Theaters, 475 U.S. 41, 51-52 (emphasis added by petitioner).

From this language, petitioners conclude the following:

> It appears then that it is implicitly assumed in this Court's *Renton* decision that a legislative body must not only identify the interest served by an enactment restrictive of speech and articulate a reasoned and significant basis for its legislative action, it must do that *before* it acts and the objective and evidence on which the legislature relies should appear in the legislative record leading to the enactment.

(PB.24).

Petitioners' interpretation of the above-quoted *Renton* passage is totally unfounded and far reaching. There is nothing in that language to enable petitioner or this Court to "implicitly assume[]" that the *Renton* Court's directive that "whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses" means that a city must create a legally defensible legislative record before it acts. As the court explained in the opinion below "We find no such rule in *Renton*, *Mitchell* or any other governing precedent." (A.28). It stated further:

> There is a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment is challenged and a requirement that such a factual basis have been submitted for the legislative body prior to the enactment of the legislative measure. ***We have always required the former; we have never required the latter.***

(A.28) (emphasis added).

Next, petitioners assert that Justice Powell's concurring opinion in *Young v. American Mini-Theatres, Inc.*, 438 U.S. 265, 320, n.54 (1978), provides support for their interpretation of *Renton* (PB.24) where he states that courts must be alert to the possibility that a city might use the power to zone as a pretext for suppressing expression. *Id.* at 320, n.54, *concurring opinion of Justice Powell.* However, Justice Powell's concerns are wholly consistent with the concerns expressed by the court below, as is evident from the following excerpt of the third circuit's opinion:

> . . . [O]ur First Amendment jurisprudence requires that the Borough identify the justifying secondary effects with some particularity, that they offer some record support for the existence of those effects and for the Ordinance's amelioration thereof, and that the plaintiffs be afforded some opportunity to offer evidence in support of the allegations of their complaint. To insist on less is to reduce the First Amendment to a charade in this area.

(A.22).

There is no question that, as petitioners point out, the Borough must identify the secondary effects it seeks to prevent through its ordinance in order to demonstrate that the ordinance is not a pretext for suppressing speech. However, petitioners' reiteration of this argument offers no support for their argument that the Borough was constitutionally bound to present such evidence prior to passing the ordinance. The court below practically and properly dealt with this issue by remanding the matter to the district court at which time the Borough will be required to make such a demonstration.

Finally, petitioners cite *Turner Broadcasting System v. FCC*, 520 U.S. __, 137 L. Ed. 2d 369 (1997), as allegedly supporting their argument that "a contemporaneous record of justification is required." (PB.25). There, this Court was reviewing the "must carry" provisions of the Cable Television Consumer Protection & Competition Act of 1992 adopted by Congress and held that the court must determine that "Congress has drawn reasonable inferences based on substantial evidence". Respondents submit the *Turner* decision is entirely consistent with the decision of the court below as is demonstrated by the third circuit court's reliance on same (A.20). The very purpose in remanding the matter to the district court is so that the Borough can attempt to make such a showing and petitioners have the opportunity to refute it (A.18).

Petitioners have failed to demonstrate that the decision of the Court of Appeals for the Third Circuit conflicts with any relevant decisions of the Supreme Court or other Courts of Appeals. Instead, a review of the decisions cited by petitioners demonstrates that the opinion below is entirely consistent with the decisions of this Court. Consequently, petitioners' argument cannot serve as a basis for this Court's jurisdiction and the petition should be denied.

III.

PETITIONERS' ARGUMENT THAT THE COURT BELOW PREMISED ITS DETERMINATION ON A MISCONCEPTION IS WITHOUT MERIT AND DOES NOT SERVE AS A BASIS FOR THE GRANTING OF THE PETITION.

Petitioners argue that the petition should be granted because the court below based its determination, in part, on a misconception (PB.19). Specifically, petitioners quote the

following sentence from the opinion as support for this contention:

> . . . most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed legislative measures . . . [W]e believe that insistence on the creation of a legislative record is unwarranted intrusion into the internal affairs of the legislative branch of governments.

(PB.19; A.2).

In further support of this argument, petitioners cite a provision of the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-26a, as well as an excerpt of a decision of "a New Jersey Court" that purportedly interprets a similar provision of the Municipal Land Use Law (PB.21). However, petitioners provide no citation for the New Jersey court decision or for the provision of the Municipal Land Use Law that the court is interpreting and we have been unable to identify same. Accordingly, since respondents cannot identify the case petitioners fail to cite, it will address this portion of petitioners' argument in a general manner.

Petitioners' argument that the third circuit court's decision was premised on a "misconception" must fail for several reasons. First, the sentence quoted by petitioners and set forth above is merely that — one sentence in a lengthy opinion — that is taken out of context. The language that precedes and completes the paragraph from which this sentence was taken is as follows:

> There is a significant difference between the

> requirement that there be a factual basis for a legislative judgment and a requirement that such factual basis have been submitted to the legislative body prior to the enactment of the legislative measure, We have always required the former; we have never required the latter. Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, their own life experience and common sense so ling as they come forward with the required showing in the courtroom once a challenge is raised.

(A.28-29).

It is clear that, taken in context, the court below did not rely on its assertion that "some municipal . . . councils . . . do not hold hearings and compile legislative records" in order to decide the case before it. This is particularly true since the decision below expressly states that the Borough of Keyport "held a public meeting to consider proposed Ordinance No. 31-92" that "[t]he Board had earlier solicited and reviewed a legal opinion concerning the Ordinance" that, at the hearing itself "heard an oral presentation by an engineering expert" and that the Planning Board "recommended that the council pass the proposed ordinance, but suggested three changes . . ." (A.7). Further, the court below made the following significant observation about the hearing:

> The minutes of the meeting indicate that, although the meeting was open to the public for comment, ***the sole comment on***

> ***Ordinance No. 31-92 was made by the Borough counsel . . .***

(A.7).

Therefore, not only was there a public hearing at which the Planning Board made recommendations, but the record reflects that the hearing was open for public comment and ***petitioners chose not to comment or speak out against the proposed Ordinance despite the opportunity to do so.***

The second problem with petitioners' argument is that they cite the Municipal Land Use Law to demonstrate that the third circuit court was wrong in stating that municipalities do not always hold hearings. Specifically, petitioners cite N.J.S.A. 40:55D-26a which states that, when adopting or amending a development regulation "the Planning Board *shall* make and transmit to the governing body . . . a report" and that, when considering adoption or amendment "the governing body shall review the report of the Planning Board . . ." (emphasis added). Petitioners rely on this language as proof that, contrary to the statement of the court below, a municipal governing body is required by state statute to hold hearings and compile a record (PB.20-21). However, petitioners left out the following significant portion of the statute:

> Failure of the planning board to transmit its report within the 35-day period provided herein ***shall relieve the governing body from the requirements of this subsection in regard to the proposed development regulation, revision or amendment thereto referred to the planning board.***

N.J.S.A. 40:55D-26a. This sentence renders petitioners' argument on this point null and void.

Finally, petitioners argue that, "a New Jersey court", in interpreting a provision of the Municipal Land Use Law that is similar to that of N.J.S.A. 40:55D-26a, explains the purpose and necessity of a contemporaneous record (PB.21). However, without providing a citation to either the case or the provision at issue, petitioners note that the provision "requires that a zoning ordinance ***that is inconsistent with the municipality's master plan*** be accompanied by a resolution giving the reason for the inconsistency." (PB.21).

This provision and therefore the case that petitioner claims interprets the provision is not applicable to the matter at hand. The Keyport Ordinance is not inconsistent with the municipality's master plan. To the contrary, as the court below points out, Ordinance No. 31-92 explicitly states that it is only the very adult entertainment uses that the Ordinance seeks to regulate that "conflict with the Borough Master Plan, particularly those segments listed on pages 16 and 19 therein which provide that a primary zoning objective is to preserve and protest [sic] existing residential areas and to enhance the desirability thereof." (A.8).

Thus, the Ordinance in this case will actually prevent inconsistencies with Keyport's master plan, and petitioners' final argument on this point must also fail.

CONCLUSION

For the foregoing reasons, the undersigned, on behalf of respondents the Borough of Keyport, Victor Rhodes and the Board of Adjustment of the Borough of Keyport, respectfully request that the petition for certification is denied.

Respectfully submitted,

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